

COMMENT

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It is with great pleasure that I take this opportunity to comment on a topic addressed in the articles by Professors Osuka¹ and Nakamura,² namely, the nature of the socio-economic rights guaranteed by the 1947 Constitution.

In his article on welfare rights, Professor Osuka explained in detail the debate taking place in Japan on the scope of those rights and whether they are judicially enforceable. Article 25 of the Constitution expressly states that “all people shall have the right to maintain the minimum standards of healthy and cultured living.” The Constitution has only this abstract clause addressing welfare rights; however, concrete support for the existence of welfare rights is provided through such statutes as the Livelihood Protection Law, the Child Allowance Law, and the Welfare Pension for the Aged Law. Presumably, if a right under Article 25 is judicially enforceable, one could seek a remedy in court when the Diet fails to provide the substantial aid that the Constitution requires.

As Professor Osuka explains, Japanese constitutional law scholars have formulated three theories on the nature of Article 25’s welfare rights. These theories are the Programmatic Declaration Rights Theory, the Abstract Rights Theory, and the Concrete Rights Theory. This split of opinion on the scope of welfare rights may seem unusual to Americans, whose welfare rights derive only from federal or state legislation, but, as I noted, while the Constitution directly guarantees the right to live a decent life, substantial aid is provided only through statutes. The debate over Article 25’s guarantees arose because there was a large gap between the guarantees of the Constitution and the economic realities in the years following the war, when most people were living barely above the subsistence level and the government was unable to provide a living consistent with the language of Article 25. It should be remembered that a similar debate took place among public law scholars in Germany after the end of World War I.

Most Japanese constitutional law scholars support the Abstract Rights Theory’s interpretation of Article 25. Under this view, the courts can only declare the government’s failure to provide the needy with a decent life as a violation of the Constitution. Once having declared the government in violation of the Constitution, the courts can go no further. The Supreme Court, on the other hand, adopted the rationale of the Programmatic Declaration Rights Theory in the Supreme Court Grand Bench decision of

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1. Osuka, *Welfare Rights*, LAW & CONTEMP. PROBS., Spring 1990, at 13.

2. Nakamura, *Freedom of Economic Activities and the Right to Property*, LAW & CONTEMP. PROBS., Spring 1990, at 1.

May 1967 in the famous Asahi case.³ Under the Programmatic Declaration Rights Theory, no one can seek a judicial remedy if the government fails to provide a decent life. The Court's approach originated in the early postwar years when the Diet and the Cabinet could not provide the needy with sufficient aid as required by Article 25 and the Court simply deferred to the judgment of the political branches on welfare rights. Under the third and most positive approach, the Concrete Rights Theory, the courts are legally obligated not only to declare the Diet's failure to guarantee the minimum standards of wholesome and cultured living unconstitutional, but also to force the Diet to legislate in order to achieve this goal. Most Japanese constitutional law scholars consider this theory to be too extreme because they believe that the doctrine of separation of powers, one of the most important constitutional principles in Japan, makes it constitutionally impossible for the courts to force the Diet to legislate.

In his article, Professor Osuka announces that he supports the Concrete Rights Theory rather than the Abstract Rights Theory. However, his views, in one respect, are no different from those held by proponents of the Abstract Rights Theory, because, under both theories, the courts can only declare the legislature's failure to provide a decent life a constitutional violation; they cannot take further remedial action. At the same time, Professor Osuka's views depart from the Abstract Rights Theory, since he believes that the Diet is obligated to state its intention to act or not to act when the court has declared legislative inaction unconstitutional. In his article, Professor Osuka announces a unique theory, which is certainly worth examining, on the nature of constitutional guarantees under Article 25.

The debate on the scope of Article 25's welfare rights has subsided recently as Japan's economy has developed. However, as Professor Osuka points out, Article 25's guarantee of the right to maintain a minimum standard of wholesome and cultured living is being used increasingly as a legal tool to protect society and the environment from pollution.

I would like to turn now to the problem of regulating economic freedom and property rights. As Professors Osuka and Nakamura pointed out in their articles, the Japanese Constitution was very much influenced by the philosophy of the New Deal. For example, section 1 of Article 22 states that "every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare." Article 29 further provides that "the right to own or to hold property is inviolable," that "property rights shall be defined by law, in conformity with the public welfare," and that "private property may be taken for public use upon just compensation therefor." These constitutional provisions, which guarantee economic freedom and property rights, apparently make it easier for the Diet, in the context of the public welfare, to regulate these rights than civil rights and civil liberties. This fact means that

3. 21 Minshū 1043 (Sup. Ct., G.B., May 24, 1967) (*rev'g* 14 Gyōshū 53 (Tokyo Dist. Ct., Oct. 19, 1960) and *aff'g* 21 Minshū 1043 (Tokyo H. Ct., Nov. 4, 1963)).

regulation of economic freedom and property rights is given a legal presumption of constitutionality.

However, the problem that currently confronts us in Japan is to what extent these rights can be regulated by the government. As those of you who have been to Japan know, the price of real estate in the large cities, especially Tokyo, has soared frighteningly because of the scarcity of land and the speculation by realtors. This current situation is intolerable. Everyone agrees that some drastic steps should be taken to stem this trend.

At the October 1989 conference of the Japan Public Law Association in Tokyo, this topic was taken up at one of the programs. The late Professor Takahara had insisted that the property protected by the Constitution was so-called "small property," not "big property." One scholar at the conference asserted Professor Takahara's position and said that the property guaranteed by the Constitution is that which is acquired through one's own labor and necessary for human life. "Big property," which is not acquired by one's own labor, is not inviolable and permanent, although Articles 11 and 97 "declare rights and liberties" guaranteed in the Constitution as "eternal and inviolate." This scholar suggests that "big property" can be regulated if there is a reasonable ground for it. In other words, under this scholar's view, a rationality test, not a strict scrutiny test, can be applied to determine the constitutionality of the regulating measure when a lawsuit to contest it is filed. This view currently prevails in Japan with respect to economic freedom and property rights.

